Supreme Court, U. S.
FILED
AUG 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-208

In the Supreme Court of the United States

October Term, 1980

GILBERT EWALD,
Petitioner,

vs.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Sixth Circuit Err in Holding That a Claimant Under the Age Discrimination in Employment Act in a Deferral State, Who Fails to Commence State Proceedings Within 180 Days Does Not Then Have Available to Him the Extended 300 Day Period for Notification of Intent to Sue to the Secretary of Labor?

TABLE OF CONTENTS

Question Presented for Review 1

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of Case 3

Reasons for Allowance of the Writ—

The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision in Conflict With the Decision of Another Federal Court of Appeals on the Same Matter, and 5

The United States Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law in a Way in Conflict With Applicable Decisions of This Court 5

Conclusion 8

Appendix A A1

Appendix B A6

Appendix C A7

Table of Authorities

CASES

Bean v Crocker National Bank, 600 F. 2d 754 (9th Cir. 1979) 5, 6, 7

Ciccone v Textron, Inc., 616 F. 2d 1216 (1st Cir. 1980) 5, 6

Mohasco Corp. v Silver, 48 U.S.L.W. 4851 (June 23, 1980) 6, 7, 8

Oscar Mayer & Co. v Evans, 99 S. Ct. 2066 (1979) 5, 7, 8

PREVIOUS PAGE WAS BLANK

STATUTES

28 U.S.C. §1254(1) 2
28 U.S.C. §1337 4
Age Discrimination in Employment Act—
29 U.S.C. §621 2
29 U.S.C. §626(d) 2, 4, 6
29 U.S.C. §626(d)(2) 2, 4, 5, 6
29 U.S.C. §633(b) 2, 6, 7
MCLA 423.303 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Gilbert Ewald respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, or in the alternative that this Court order a summary disposition on the merits.

OPINIONS BELOW

The decisions and orders of the District Court for the Eastern District of Michigan, Northern Division, are not reported and are reproduced in Appendices A and B (A1-A6). The opinion of the Court of Appeals for the Sixth Circuit apparently will be reported, however, the citation is unavailable at this time; the opinion is reproduced in Appendix C (A7-A19).

JURISDICTION

The opinion of the court of appeals was filed and judgment entered on May 9th, 1980.

Jurisdiction is conferred on this court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967 found at 29 U.S.C. 621 *et seq.* (hereinafter referred to as ADEA) will be generally referred to and the specific sections of that act which will be called upon for interpretation and application are as follows:

29 U.S.C. §626(d) which provides:

> (d) No civil action may be commenced by any individual under this section until the individual has given the secretary not less than 60 days notice of an intent to file such action. Such notice shall be filed—
>
> > (1) within one hundred eighty days after the alleged unlawful practice occurred; or
> >
> > (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.

29 U.S.C. §633(b) provides:

> (b) In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing

or authorizing a state authority to grant or seek relief from such discriminatory practice, no suit may be brought under §626 of this title before the expiration of sixty days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated.

STATEMENT OF CASE

Petitioner Gilbert Ewald was born July 26th, 1933. He was employed by the Respondent Great Atlantic & Pacific Tea Company on or about February 23rd, 1952, in respondent's retail outlet in the Detroit area as a carry-out person. Petitioner eventually elevated himself to the position of store manager in approximately October of 1972 and remained in that capacity until his termination on or about April 21st, 1975. At the time he was terminated, the store he was managing in Onaway, Michigan, had been closed. Petitioner did request of respondent a transfer to another store in a management position, and was advised by respondent's agent that he would be notified of any openings.

Subsequent to petitioner's discharge, information came to him that other managers of closing stores were being transferred, and further, that respondent was hiring new employees and placing them in management positions. On or about January 26th, 1976, petitioner through his attorney submitted to the Secretary of Labor a notice of intent to file a civil action under the ADEA. Thereafter, on or about March 25, 1976, employee filed a complaint with the Michigan Civil Rights Commission pursuant to Michigan Compiled Laws Annotated section 423.303.

On June 21st, 1976, petitioner was notified by the Department of Labor that conciliatory action on their be-

half had been unsuccessful and petitioner was advised that he was free to bring a civil action against employer under ADEA. On August 19th, 1976, petitioner commenced this action in the United States District Court for the Eastern District of Michigan, Northern Division, alleging age discrimination in violation of the ADEA. Jurisdiction in the District Court was based on 28 U.S.C. §1337.

Respondent filed a motion for summary judgment alleging that petitioner failed to satisfy the notice requirements of the ADEA found at 29 U.S.C. §626(d). The District Court in its opinion and order dated July 27th, 1977, granted respondent's motion for summary judgment, in effect holding that since petitioner did not file timely with the Michigan Civil Rights Commission, that he was therefore not entitled to the longer notice period of §626 (d) (2) of the ADEA. (See Appendix A).

The United States Court of Appeals for the Sixth Circuit in reviewing the findings of the District Court recognized that, while the state proceedings are mandatory in a "deferral state", such state proceedings may be taken after federal action is begun as was done in the case at hand. The Court went on to hold, though, that if state action is not commenced within 180 days after the act of discrimination, then the 300 day period for notifying the secretary of intent to sue is not available to the petitioner.

REASONS FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision in Conflict With the Decision of Another Federal Court of Appeals on the Same Matter, and

The United States Court of Appeals for the Sixth Circuit Has Decided an Important Question of Federal Law in a Way in Conflict With Applicable Decisions of This Court.

The United States Court of Appeals for the Sixth Circuit in this case declined to follow the previously rendered decision of the Court of Appeals for the Ninth Circuit in addressing the same issue. The Sixth Circuit Court held that in order to have the benefit of the extended 300 day period for notice of intent to sue as provided in §626(d)(2) of the ADEA, the petitioner must have commenced state proceedings within 180 days after the alleged act of discrimination. The Ninth Circuit Court held in *Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979) that in a Deferral State a notice of intent to sue filed with the secretary within 300 days of an alleged Discriminatory Act is sufficient regardless of whether or not State Proceedings are timely.

It is recognized that in a Deferral State it is necessary to commence state proceedings but this Court has previously held that there is no requirement that state proceedings must be filed within the time limits specified by state law. *Oscar Mayer & Co. v. Evans*, 99 S. Ct. 2066, 2073 (1979). Both the Court of Appeals for the Sixth Circuit and the Court of Appeals for the First Circuit in *Ciccone v. Textron, Inc.*, 616 F. 2d 1216 (1st Cir. 1980) chose to interpret this Court's holding in *Oscar Mayer & Co. v. Evans, supra*, as not disposing of the issue of

when a claimant under the ADEA in a Deferral State must file his notice of intent to sue with the secretary of labor. Petition for Certiorari was filed with this Court in *Ciccone v. Textron, Inc., supra,* on June 16th, 1980. Since that date this Court has decided the case of *Mohasco Corp v. Silver,* 48 U.S.L.W. 4851 (June 23, 1980). It appears from a review of that opinion that the decision of the Ninth Circuit in *Bean v. Crocker National Bank, supra,* is correct.

In the instant case it is conceded by respondent that Michigan is a Deferral State as described in 29 U.S.C. §633(b). It is the contention of respondent, though, that petitioner's failure to file charges or file a complaint with the appropriate state agency within 180 days of the alleged discriminatory act forecloses petitioner's right to the extended 300 day period for filing a notice of intent to sue as provided in 29 U.S.C. §626(d)(2). The petitioner did file a notice of intent with the secretary of labor within the 300 day period, but at that time had not filed a complaint with the appropriate Michigan agency. Thereafter, a complaint was filed with the appropriate Michigan agency and a period of more than 120 days was allowed to pass before this action was commenced in the United States District Court for the Eastern District of Michigan, Northern Division.

29 U.S.C. §633(b) provides that no suit may be brought under the ADEA before the expiration of 60 days after proceedings have been commenced under the state law. This section was complied with. 29 U.S.C. §626(d) provides that a civil action cannot be commenced under ADEA until the secretary of labor has been given 60 days notice so that he can attempt to eliminate the alleged unlawful practices. Again the 60 day period was complied with. It seems apparent that all of the notice requirements of the ADEA have been complied with by petitioner.

Although *Mohasco Corp. v. Silver, supra,* dealt with the notice requirements in a Title VII case, this Court has previously held in *Oscar Mayer & Co. v. Evans, supra,* at page 2071, that the interpretation of the notice requirements under ADEA and Title VII is identical. The distinguishing feature, though, between ADEA and Title VII is that there is no period of exclusive jurisdiction for the Deferral State to proceed. All that is required under ADEA is that the state be given 60 days to act before civil litigation is commenced with the District Court. (See 29 U.S.C. §633(b)). In the instant case the time limitations as required were complied with.

Mohasco Corp. v. Silver, supra, seems to clearly establish the principle that when state proceedings are commenced is unimportant, as long as they are commenced and allowed to proceed. As was pointed out by this Court in *Mohasco, supra,* at page 4853, n. 19:

> . . . congress included no express requirement that state proceedings be initiated by any specific date in the portion of the subsection that relates to time limitations in deferral states.

Again, it is important to note that the requirement that the state agency have time to act was complied with, as a period of well in excess of 60 days elapsed before the civil suit was commenced.

In view of this Court's holding in *Oscar Mayer & Co. v. Evans, supra,* and *Mohasco Corp. v. Silver, supra,* it appears as though the Court of Appeals for the Ninth Circuit in *Bean v. Crocker National Bank, supra,* and Circuit Judge Jones in the instant case in his dissenting opinion were correct in their interpretation of this Court's view of the application of the notice requirements of the ADEA.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted so that the judgment and decision of the United States Court of Appeals for the Sixth Circuit may be reviewed, or in the alternative that this Court grant summary disposition based upon the decisions in *Oscar Mayer & Co. v. Evans,* 99 S. Ct. 2066 (1979) and *Mohasco Corp. v. Silver,* 48 U.S.L.W. 4851 (June 23, 1980).

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CIVIL ACTION NO. 76-10080

GILBERT EWALD,
Plaintiff,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the Federal Building, Bay City, Michigan on July 27, 1977

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This action is brought by plaintiff under the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 626(c), alleging that he was wrongfully terminated from employment with defendant at age 42 on account of his age. The action is before the Court on defendant's motion for summary judgment. The only issues raised are whether plaintiff failed to file a complaint with the Michigan Civil Rights Commission and to notify the Secretary of Labor of his intention to bring suit as required by 29 USC 626(d) and 633(b).

Section 626(d) of the ADEA requires a minimum of 60 days notice to the Secretary of Labor of an intent

to bring suit prior to the commencement of an action. The section further provides that said notice must be filed within 180 days of the alleged discriminatory conduct except for cases to which section 633(b) applies. Under section 633(b), the notice to the Secretary must be filed within 300 days of the alleged discriminatory conduct. Section 633(b) also requires that 60 days have elapsed from the commencement of State enforcement proceedings before suit may be brought under the ADEA.

In this case, plaintiff has alleged and the parties have stipulated at the deposition of plaintiff that the Secretary of Labor was notified of the intention to bring suit on January 26, 1976, and that plaintiff filed a complaint with the Michigan Civil Rights Commission on March 25, 1976. The discriminatory conduct is alleged to have occurred on April 21, 1975.

It is defendant's position that this action is barred because plaintiff did not file the notice with the Secretary of Labor within the shorter notice period of Section 626(d) and that plaintiff is not entitled to the longer notice period of Section 633(b) because he did not timely file a complaint with the Michigan Civil Rights Commission. Defendant also asserts that the failure to timely file with the Michigan Civil Rights Commission acts to bar this action in and of itself.

This district has addressed these issues at great length. In *Magalotti v Ford Motor Co.*, 418 F Supp 430 (E.D. Mi., 1976) (J. Feikens), it was held that the failure to timely file a complaint with the Michigan Civil Rights Commission within the 90 day period allowed by MCLA 423.307(b)[1] did not act to bar the bringing of an action

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f.n. 1 Repealed by P.A. 1976, No. 453, §804, effective March 31, 1977.

under the ADEA. The decision is consistent with the prior decision in *Bertsch v Ford Motor Co.*, 415 F Supp 619 (E.D. Mi., 1976) (J. Pratt), where it was held that the failure to timely file with the Michigan Civil Rights Commission did not bar suit under the ADEA provided that the plaintiff filed the requisite notice with the Secretary of Labor within the shorter notice period of Section 626(d). By contrast, in *Gabriele v Chrysler Corp.*, 416 F Supp 666 (E.D. Mi., 1976) (J. Kennedy), it was held that the failure to timely file with the Michigan Civil Rights Commission acted to bar the commencement of an action under the ADEA. The Court finds it unnecessary to determine at this time which of these views should be followed, as from the face of the Complaint it is apparent that plaintiff neither timely filed with the Michigan Civil Rights Commission or timely notified the Secretary of Labor within the shorter period of Section 626(d). See also *Skoglund v Singer Co.*, 403 F Supp 797, 802-803 (D.N.H. 1973) and *Bonham v Dresser Industries Ind.*, 424 F Supp 891 (W.D. Pa., 1976).

At a more basic level, plaintiff asserts that he did timely file with the Michigan Civil Rights Commission because that each time defendant hires someone of a younger age than plaintiff a new act of discrimination occurs.

MCLA 423.303a(a), prior to its repeal by P.A. 1976, No. 453, §804 (effective March 31, 1977), provided that it was an unfair employment practice to discriminate against an individual, because the individual is between the ages of 18 and 60, "---with respect to hire, tenure, terms, conditions, or privileges of employment," MCLA 423.307(b) prior to repeal provided that:

> "Any individual claiming to be aggrieved by an alleged unlawful employment practice may---file with

the board, within 90 days after the alleged act of discrimination, a verified complaint---"

Both MCLA 423.303a(a) and 423.307(b) indicate that reference must be had to a particular discriminatory act affecting the individual which is concerned with the terms or conditions of his employment. The statute does not support a construction that a new grievance arises every time a practice is followed in accordance with a changed condition in employment. Rather, it is when the condition first changes which is crucial for purposes of when the time periods for bringing a complaint are commenced. See *Pompey v General Motors Corp.*, 385 Mich 537, 550 (1971).

Even if Michigan law would consider each instance of hiring of someone younger than plaintiff to be considered as a separate act of discrimination, for federal law it is the time of the act of discharge which is controlling. *Ott v Midland-Ross Corp.*, 523 F2d 1367, 1369 (CA 6, 1975); *Hiscott v General Electric Co.*, 521 F2d 632 (CA 6, 1975).[2] Likewise, the Complaint fails to allege the jurisdictional requirement of any notice to the Secretary of Labor concerning such possible later discriminatory acts. *Ott v Midland-Ross Corp.*, 523 F2d at 1370. Such later acts of discrimination also do not operate to toll the Michigan limitation as to any prior act. *Washington v Chrysler Corp.*, 68 Mich App 374, 380 (1976).

The final argument by plaintiff is that equitable considerations require that his failure to comply with the notice and filing provisions be excused. Reliance is placed on the allegation set forth in paragraph 12 of the Complaint that the United States Department of Labor advised plain-

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f.n. 2 See also *United Airlines v Evans*, ... US ....., 45 LW 4566 (1977), in the context of Title VII, 42 USC 2000e, *et seq.*

tiff on June 21, 1976, that the requirements of section 626(d)(2) had been met. Without consideration of the actual purport of this notice or whether equitable considerations are relevant under the ADEA, the Court finds that it is sufficient to note that on June 21, 1976, the time period for both notice to the Secretary of Labor and for filing with the Michigan Civil Rights Commission had already expired.

For these reasons, the Court finds that this suit is barred. Defendants motion for summary judgment is GRANTED. Judgment shall be entered accordingly.

IT IS SO ORDERED

/s/ James Harvey
James Harvey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Civil Action No. 76-10080

GILBERT EWALD,
Plaintiff,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Defendant.

JUDGMENT

This action came on for hearing before the Court, Honorable James Harvey, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. recover of the plaintiff, GILBERT EWALD his costs of action.

Dated at Bay City, Michigan, this 29th day of July, 1977.

Henry R. Hanssen, Clerk
/s/ Susan M. Schubert
By: Susan M. Schubert
Deputy Clerk

APPENDIX C

No. 77-1600

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GILBERT EWALD,
Plaintiff-Appellant,

v.

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 9, 1980.

Before: LIVELY, BROWN and JONES, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court in which BROWN, Circuit Judge, joined. JONES, Circuit Judge (pp. 10-12) delivered a separate dissenting opinion.

LIVELY, Circuit Judge. The issues in this case relate to time requirements contained in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (1976) (ADEA or the Act). The Act provides that before a civil action may be brought by an individual, the plaintiff must give the Secretary of Labor "not less than sixty days' notice of an intent to file such action."[1] The two subsections of § 626(d) following the quoted language then establish the time requirement for giving notice to the Secretary as follows:

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1. ADEA § 7(d), 29 U.S.C. § 626(d).

Such notice shall be filed—

> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

ADEA § 7(d)(1), (2); 29 U.S.C. § 626(d)(1), (2).

The Act also encourages settlement of claims of age discrimination in employment by conciliation at the state level. States which have a law prohibiting age discrimination in employment and an agency authorized to grant or seek relief from such discrimination are known as "deferral states." Though initial complaints and notices may be filed with a state agency and the U.S. Department of Labor simultaneously where a claimed act of discrimination occurs in a deferral state, no federal court action may be filed until the expiration of 60 days after proceedings have been commenced under the state law.[2] While the Supreme Court has held that the commencement of state proceedings is mandatory in deferral states, this step may be taken after a federal court action is begun and that action may be held in abeyance pending the outcome of state proceedings. *Oscar Mayer & Co. v. Evans*, 441 U.S. ....., 99 S.Ct. 2066, 2076 (1979).

Thus the scheme of the Act is to require resort to state procedures in deferral states, with the state agency having 60 days to effect conciliation before its efforts are superseded by court proceedings. Further, in cases from

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2. ADEA § 14(b), 29 U.S.C. § 633(b).

both deferral and non-deferral states the Secretary of Labor is given 60 days to attempt conciliation before an individual may seek relief in court.

I.

In the present case the plaintiff-appellant, Ewald, was terminated by the defendant-appellee, A&P, on April 21, 1975. Ewald was 42 years old and entitled to the protection of the Act. The alleged act of discrimination occurred in Michigan, a deferral state. *See Rucker v. Great Scott Supermarkets,* 528 F.2d 393 (6th Cir. 1976). On January 26, 1976 Ewald notified the Secretary of Labor of his intent to bring an action under ADEA. This was more than 180 days and less than 300 days after his termination. However, Ewald did not file a complaint with the Michigan Civil Rights Commission (MCRC) until March 25, 1976, 319 days after his termination. Plaintiff's counsel was advised that the MCRC could take no action on his complaint because it was filed more than 90 days after the alleged discriminatory act. *See* Michigan Compiled Laws §§ 433.301 et seq.

This action was filed in the district court on August 19, 1976. After discovery had been completed by the defendant it moved for summary judgment on the ground that the action was barred for failure of the plaintiff to pursue his state remedies in a timely manner and failure to notify the Secretary of Labor of his intentions to sue within 180 days. The plaintiff responded that he had not filed suit until more than 60 days after tendering a complaint to the MCRC and that his notice to the Secretary was given within the 300-day period provided for deferral states. Observance of these limits made his filing timely, he claimed. He also argued that there were equitable reasons for not requiring strict adherence to the notice

requirement. The district court granted the motion for summary judgment and dismissed the action upon finding that Ewald had not timely filed with the MCRC or notified the Secretary of Labor within the time limits established by § 626(d). The district court further found no basis for permitting a deviation from the requirements of the Act on equitable grounds.

II.

Though an ADEA claimant in a deferral state must commence an action under state law, his federal rights are not affected by a state provision which requires filing or notice within a period which is shorter than the 180-day notice period of § 626(d)(1). State limitations provisions "cannot govern the efficacy of the federal remedy." *Oscar Mayer & Co. v. Evans, supra,* 441 U.S. ....., 99 S.Ct. at 2074; *Gabriele v. Chrysler Corp.,* 573 F.2d 949, 956 (6th Cir. 1978) (concurring opinion), *vacated and remanded on other grounds,* ..... U.S. ....., 99 S.Ct. 2819 (1979); *Bonham v. Dresser Industries, Inc.,* 569 F.2d 187, 194 (3d Cir. 1977). Thus the fact that Ewald failed to file with the MCRC within 90 days was of no consequence. However, we must decide whether the fact that he neither commenced a state action nor notified the Secretary of Labor of his intent to bring suit within 180 days after his termination required dismissal of his action. The question is: Does the fact that an alleged violation of the Act occurred in a deferral state give the plaintiff 300 days in which to notify the Secretary of intent to sue, even though no state action is begun within 180 days of the occurrence?

The Ninth Circuit had this question before it in *Bean v. Crocker National Bank,* 600 F.2d 754 (1979), and held that *Oscar Mayer, supra,* and the plain language of the

Act compel the conclusion that "in a deferral state, an ADEA claimant may provide notice of intent to sue to the Secretary within 300 days of an alleged discriminatory act regardless of whether or not state proceedings have been timely commenced." 600 F.2d at 759. We respectfully decline to follow the *Bean* decision. As we read *Oscar Mayer,* it holds that a deferral state complainant may not ignore the state procedures and that failure to comply with a state requirement for commencing proceedings in a period shorter than 180 days does not bar a federal action. However, since the plaintiff in *Oscar Mayer* did notify the Secretary within 180 days, that case did not involve entitlement to the benefit of the extended notification period. One footnote statement in *Oscar Mayer* indicates that if this question had been before the Court it would have decided the matter as we do in this opinion.[3] Referring to the second basis of the *Bean* decision, a casual reading of the statute might lead one to the conclusion that a deferral state claimant has no duty to give notice or commence an action within 180 days. However, when the overall structure and scheme of the Act are considered, we find this conclusion untenable.

Congress appears to have concluded that 180 days is a reasonable time for an aggrieved party to determine that a claim under the ADEA exists. The only discernible reason for extending the notification period for a claim arising in a deferral state is to give the state an opportunity to conciliate the dispute. One purpose of the notice provi-

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3. 99 S.Ct. at 2976 n. 11.

In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor. See *Davis v. Valley Distributing Company, supra.* Cf. *Burnett v. New York Central Railroad,* 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965).

sions of § 626(d) is to protect the employer and any other prospective defendants from the necessity of defending stale claims. The Secretary is required to notify prospective defendants "promptly" upon receiving notice of intent to sue. 29 U.S.C. § 626(d). The 300-day provision will not work to the detriment of prospective defendants if state proceedings are begun within 180 days because they will learn of the claims through the state agency which is seeking to conciliate them. However, if a deferral state plaintiff takes no steps during the 180-day period, the claim may be as much as 300 days old when the prospective defendants receive their first notice of it.

To require a deferral state plaintiff, within 180 days of the occurrence, either to commence state proceedings or to notify the Secretary of intent to sue would impose upon him the same basic time limit for initiating action as that imposed by the Act on a claimant in a non-deferral state. If he chooses to exhaust his state remedies before resorting to any federal procedure, a claimant may defer giving notice to the Secretary for as long as 300 days after the alleged discriminatory act. During that period the matter may be resolved through state efforts and no notice to the Secretary will be required. However, if the claimant fails to commence state proceedings within 180 days, he should be required to give the Secretary notice of intent to sue within that time. Otherwise, claimants in deferral states who make no effort to use the state procedures would have 120 days longer to initiate an ADEA claim than those with identical claims in non-deferral states. The purpose of the extended period would not be served, and prospective defendants would be denied prompt notice of the impending action. Thus we agree with the district courts which have required claimants in deferral states either to commence state proceedings

or to notify the Secretary within 180 days. *See Bertsch v. Ford Motor Co.*, 415 F.Supp. 619 (E.D. Mich. 1976); *Scoglund v. Singer Co.*, 403 F.Supp. 797 (D.N.H. 1975). The extended (300-day) period for notification of intent to sue is not available to a deferral state claimant who fails to commence state proceedings within 180 days after the alleged act of discrimination.*

III.

Having determined that Ewald was required by § 626(d) to notify the Secretary within 180 days of his intent to sue, we must determine next whether this is an absolute requirement or one which may be altered in cases justifying equitable relief. The exact nature of the time limits in § 626(d) has been a matter of some confusion for the courts. In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975), this court held that the notice provision of § 626(d) is "jurisdictional." In *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), and *Rucker v. Great Scott Supermarkets, supra,* the court termed the notice requirements of § 626(d) "jurisdictional," but noted that no facts were found in either case to warrant equitable relief. This intimation that the requirements could be relaxed where equitable relief was warranted was a clear indication that the court did not consider the notice requirement to be jurisdictional in the strict sense. Judge McCree, dissenting in *Eklund* and concurring in *Rucker,* argued that § 626(d) created "statutory prerequisites" or "statutory preconditions," rather than jurisdictional requirements. 529 F.2d at 250-51 and 528 F.2d at 395. More recently this court has held that § 626(d) is not jurisdictional "in the sense that non-compli-

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*Since preparation of this opinion began, the First Circuit has reached the same conclusion in *Ciccone v. Textron, Inc.*, ... F.2d ..... (#79-1541, decided March 17, 1980), 48 U.S.L.W. 2635.

ance deprives a district court of the power to hear the case." *Gabriele v. Chrysler Corp., supra,* 573 F.2d at 954-55 n. 15. This approach is in accord with the holding in *Dartt v. Shell Oil Co.,* 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided Court,* 434 U.S. 99 (1977), that Congress did not intend for failure to file notice within the 180-day notice period to be an absolute bar to bringing an ADEA private action. 539 F.2d at 1259.

We believe § 626(d) contains both jurisdictional requirements and statutory prerequisites or preconditions. There appear to be two requirements which are truly jurisdictional in the sense that a district court may not entertain an ADEA action until they have been complied with: (1) Where a claim arises in a deferral state, no action may be maintained unless proceedings are at least commenced under the state law. *Oscar Mayer v. Evans, supra;* (2) Regardless of whether the claim arises in a deferral state or a non-deferral state, no action may be instituted "until the individual has given the Secretary not less than sixty days' notice of an intent to file such action." 29 U.S.C. § 626(d). Though § 626(d) uses "shall" in setting the time for giving the required notice to the Secretary, we construe the provisions of § 626(d)(1) and (2) as establishing periods of limitations rather than jurisdictional requirements. Thus we hold that commencing an action under state law in a deferral state and giving the Secretary at least 60 days notice are jurisdictional prerequisites, but that the time of filing this notice is not jurisdictional. A similar analysis of filing requirements under Title VII of the 1964 Civil Rights Act is found in *Reeb v. Economic Opportunity of Atlanta, Inc.,* 516 F.2d 924, 926 n. 2 (5th Cir. 1975).

IV.

Since the provisions for the time of filing notice with the Secretary are analogous to statutes of limitations, they may be extended for equitable reasons. The district court in the present case discussed the plaintiff's claim that there were equitable considerations which warranted a relaxation of the 180-day notice requirement. The court found that the only fact relied upon by Ewald was the receipt of a letter from the Department of Labor dated June 21, 1976 advising that he had met the requirements of the ADEA with respect to 29 U.S.C. § 626(d)(2). Since this letter was received more than 14 months after Ewald's termination, he could not have relied upon it for his failure to give notice between 180 and 300 days after that event. In the absence of reliance, there is no basis for equitable estoppel.

Ewald maintains that the district court treated his claim of equitable considerations too narrowly. In his response to the defendant's motion for summary judgment, Ewald argued that he did not file suit until 60 days after tendering a complaint to the MCRC and thus had fulfilled the only requirements of 29 U.S.C. § 633(b).[4] Having complied with the requirements of § 633(b), he contended, he was entitled to avail himself of the extended period provided by § 626(d)(2) for notifying the Secretary of his intent to sue. This was a purely legal argument and he presented no affidavit to establish the existence of

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4. ADEA § 14(b), 29 U.S.C. § 633(b), provides in pertinent part:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated.

a factual dispute. In his appellate brief Ewald states for the first time that he was advised by a letter of December 22, 1975 from the Department of Labor that an investigation was in progress regarding the termination practices of A&P. A pamphlet concerning ADEA was included with the letter, according to Ewald, and he then employed an attorney who sent the January 21, 1976 notification to the Secretary of Labor.

The December 22, 1975 letter is not in the record, and none of the facts surrounding it were presented to the district court. Before making its motion for summary judgment the defendant served interrogatories on the plaintiff and took his deposition. Ewald did not mention the earlier communications from the Department of Labor in his reply to interrogatories or during his deposition. On the record before the district court the defendant was entitled to summary judgment. A motion for summary judgment requires the adverse party to make a response in which he "set[s] forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P. The only fact mentioned by Ewald in his response was a reference to the letter of June 21, 1976. We agree with the district court that this letter, which had earlier been filed with replies to interrogatories, did not show the presence of a genuine issue for trial. The response to the summary judgment motion was primarily an argument for a construction of § 626(d) which both the district court and this court have now rejected. The district court did not err in holding that the plaintiff had presented no facts which would warrant relaxing the 180-day notice requirement on equitable grounds.

The judgment of the district court is affirmed.

JONES, Circuit Judge, dissenting.

Because I read the clear language of Section 626(d) of the Age Discrimination in Employment Act (ADEA) to grant the claimant who resides in a deferral state 300 days within which to file a charge with the Secretary of Labor after the alleged discriminatory act occurred, I respectfully dissent from Part II of the majority opinion. I concur in Parts, I, III, and IV.

Section 626(d)(2) plainly provides that the notice to the Secretary "shall be filed . . . in a case to which Section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred . . . ." All agree that Michigan is a deferral state and Section 633(b) applies. The Supreme Court has declared that the time limitations of Section 626(d) stand apart from any time restrictions found in Section 633(b). *Oscar Mayer Co. v. Evans,* 441 U.S. ....., 99 S.Ct. 2066, 2074 (1979). Therefore, a normal reading of the statute demonstrates that Ewald's claim is not time-barred. *Bean v. Crocker National Bank,* 600 F.2d 754 (9th Cir. 1979).

The reasoning of the majority is based on their conception of statutory purpose, not statutory language. The majority has in effect added language to the statute to preclude Ewald's claim. Because of the remedial purpose of the ADEA, procedural requirements not enacted by Congress should not be crafted by the court to bar claims. *Moses v. Falstaff Brewing Corp.,* 525 F.2d 92, 94 (8th Cir. 1975). I agree with the wisdom of Justice Blackmun's concurring statement that a remedial statute, such as ADEA, should be "liberally construed" in order to give "full recognition to that remedial character." 99 S.Ct. at 2076.

The majority concludes that "[t]he only discernible reason for extending the notification period for a claim

arising in a deferral state is to give the state an opportunity to conciliate the dispute." Congress did not declare that purpose in either the statute or the legislative history. Such reasoning is only post-hoc judicial rationalization and should not prevail over clear statutory language. *Paxton v. Lanvin-Charles of The Ritz, Inc.*, 434 F.Supp. 612, 615 (S.D. N.Y. 1977). As said in *Paxton*, "[t]he fact that a state procedure for dealing with complaints exists is sufficient to justify congressional extension of the time within which a plaintiff must act on his complaint." *Id.* at 615.

The majority does not cite to any persuasive authority for its reasoning. The footnote in *Oscar Mayer & Co.* to which they cite is at best ambiguous and does not address the issue before us. If anything, *Oscar Mayer & Co.* indicates that procedural requirements in ADEA should be liberally construed.

The legislative history of the 1967 enactment of ADEA is silent on the question before us. *See* 1967 U.S. Code Cong. & Ad. News 2213, 2218-19, 2224. Similarly, the legislative history of the 1978 amendments to ADEA does not reveal the majority's conceived purpose for the longer 300-day limitation in deferral states. The Senate Report describes Section 626 (d) in these terms:

> Section 7(d) of the act requires that an individual must give the Department of Labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. This period is extended to 300 days where the alleged unlawful practice occurs in a state which has an age discrimination statute which provides a remedy.

1978 U.S. Code, Cong. & Ad. News 504, 523-24. In short, the legislative history provides no support for the majority's interpretation of Section 626(d)(2).

The stated Congressional purpose of the notice requirement in Section 626(d) is "to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informed methods of conciliation." 1978 U.S. Code Cong. & Ad. News at 534. The majority's interpretation of the statute is not necessary to accomplish this purpose. A claim can hardly be labeled "old" after 300 days, when the statute of limitations for ADEA claims is two years.

The majority's conclusion engrafts a meaning to the statute which Congress did not place there. Unlike *United Steelworkers of America v. Weber,* 61 L.Ed. 2d 480, 488-89 (1979), a literal reading of the statute would not yield a result at variance with the purpose of the statute and the legislative history and historical context at the time of enactment do not compel a construction divergent from the plain meaning of the statute. Instead the majority's statutory drafting serves only to erect a procedural barrier which impedes the remedial goals of the statute. Absent a clear indication of Congressional intent justifying such a construction of the statute, I cannot agree.